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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *et al.*

Appellants

vs.

SENATOR MITCH MCCONNELL, *et al.*

Appellees.

On Appeal from the United States
District Court for the District of Columbia

Joint Reply Brief on the Merits of Appellees Emily Echols and Barret Austin O'Brock, *et al.* (FINAL VERSION)

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GLOSSARY

BCRA – Bipartisan Campaign Reform Act of 2002
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SUMMARY OF REPLY ARGUMENT

This Court has not abandoned its teaching in *Buckley v. Valeo*, 424 U.S. 1 (1976) that *political contributions* embody the exercise of fundamental rights at the core of the First Amendment. 424 U.S. at 14 ("contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"); *id.*, 424 U.S. at 22 ("The Act's contribution and expenditure limitations also impinge on protected associational freedoms"). The First Amendment dimension of contributions is obvious:

> a decision to contribute money to a campaign is a matter of First Amendment concern . . . . Through contributions the contributor associates himself with the candidate's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the votes of similarly minded voters.

Nixon v. Shrink Missouri Gov. PAC, 528 U.S. 377, 400 (2000) (BREYER, J., joined by GINSBURG, J., concurring).

On appeal, then, unless *Buckley* is to be overturned, the Government is bound to this Court's teaching in *Buckley* that *political contributions* have an important constitutional stature. Thus, it fell to the Government to show that the district court erred in concluding that Section 318 failed constitutional scrutiny under *Buckley*. In its two paragraph argument against the judgment below, however, the Government omitted even an express contention of error by the district court. *See* FEC Br. at 133-34. The Government offered no legally sufficient

reason to reverse the judgment below.

The Government did not dispute that the complete ban on political donations by minors is subject to the exacting scrutiny described by *Buckley*. Nor did the Government identify any error in the manner of the district court's application of *Buckley* scrutiny to Section 318.[1] Instead, the Government offers only two meritless arguments in its attack on the judgment below.

REPLY ARGUMENT

I. BECAUSE SECTION 318 DOES NOT SURVIVE SCRUTINY UNDER *BUCKLEY V. VALEO*, IT IS UNNECESSARY TO DECIDE WHETHER IT IS SUBJECT TO STRICT SCRUTINY.

The Government opens its defense of Section 318 by arguing against the application of strict scrutiny to Section 318. The Government urges that, in light of this Court's

1. Invoking the literary device of the hounds that did not bark in the night, *see* SIR ARTHUR CONAN DOYLE, SILVER BLAZE, in THE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES 272 (Modern Library 2001), this Court and individual Justices have occasionally considered the meaning to be drawn from unexpected silences. *See INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001); *Martinez v. Court of Appeal*, 528 U.S. 152, 159 and n.6 (2000); *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 588 n.20 (1982) (Stevens, J., joined by Blackmun, J.) (dissenting); *Jenkins v. Anderson*, 447 U.S. 231, 244 (1980) (Stevens, J.) (concurring in the judgment); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, (1980) (Rehnquist, J.) (dissenting). The Government is curiously silent about the choice of standards below and their application.

decision in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), strict scrutiny is not applicable to the ban on political contributions by minors. *See* FEC Br. at 133-34.[2] That argument is a distraction because even under the more lenient scrutiny called for by *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), Section 318 is unconstitutional. *See* Op. Br. at 3-4 (discussing holding).

The Government's argument responds to a *footnote* in the Opening Brief for these Appellees. *See* Op. Br. at 34 n.38. There, these minor Appellees noted that strict scrutiny is apt in the analysis of Section 318 because that section completely prohibits political campaign contributions by minors. *Id.* Key differences between the corporation contributions ban sustained in *Beaumont* and the complete ban on political contributions by minors imposed by Section 318, *see* Op. Br. at 37-39, undoubtedly justify the application of strict scrutiny.

The Government leaves unmentioned the fact that the footnote in question is appended to an explanation of the harmony between *Beaumont* and the judgment below. *See* Op. Br. at 34, Argument I(D). Remarkably, while attacking the call for application of strict scrutiny, the Government failed to respond to, or rebut, the meticulous showing by these Appellees that the judgment below rested on the sound application of *Buckley* scrutiny. *See*

2. It is worth noting, however, that the Government characterizes Section 318 as a *ban*, not a *limitation*. *See* FEC Br. at 134 ("the fact that BCRA § 318 bans rather than limits contributions by minors . . . is relevant to the First Amendment analysis").

Op. Br. at 19-34. Because, as the district court correctly concluded, Section 318 does not survive *Buckley* scrutiny, this Court need not decide whether strict scrutiny applies to Section 318.[3]

II. THE GOVERNMENT FAILED TO SHOW THAT SECTION 318 IS CLOSELY DRAWN IN SUPPORT OF A SUFFICIENTLY IMPORTANT GOVERNMENT PURPOSE.

The Government asserts that Section 318 is "a valid means of preventing circumvention" of contribution limits by adults. *See* FEC Br. at 134. The Government's "validity" standard is inconsistent with the First Amendment values at stake here and does not comport with this Court's application of a "rigorous standard of review," 424 U.S. at 29, in *Buckley*.

Instead of mere "validity," *Buckley* calls for an examination of the interest to be served and of the means chosen to serve the interest. Only sufficiently important purposes suffice to sustain limitations on contributions. 424 U.S. at 25. Moreover, there must be a sufficiently close drawing of the means to the end. *Id.*

The judgment below – that Section 318 violates the Constitution – rests on the conclusions of law separately reached by Judges Henderson and Kollar-Kotelly that the challenged provision did not survive scrutiny under

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3. This Court need not decide the level of scrutiny applicable to Section 318 unless it concludes, first, that the district court erred in concluding that Section 318 fails scrutiny under *Buckley*.

Buckley.[4] Rather than showing how the district court erred in its choice of the applicable standards or its application of them, the Government chooses here only to repeat its highly abbreviated, "children cannot vote so they do not count" argument. FEC Br. at 134.

A. THE GOVERNMENT FAILED TO ESTABLISH AN EVIDENTIARY BASIS SHOWING A SUFFICIENTLY IMPORTANT GOVERNMENT INTEREST IS TO BE SERVED BY SECTION 318.

The Government asserts that Section 318 is a "valid means of preventing circumvention of the FECA/BCRA contribution limits by adults who might otherwise use minors as surrogate contributors." *See* FEC Br. at 134.

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4. See Op. Br. at 3-4; Supp. App. 462sa (Henderson, J.) ("the government has not even demonstrated under *Buckley*'s contribution-to-candidate standard of review that section 318 serves a 'sufficiently important interest' by means 'closely drawn to avoid unnecessary abridgement of [First Amendment] freedoms'"); Supp. App. 1009sa (Kollar-Kotelly, J.) ("even if exacting scrutiny were applied to the present situation, Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important government interest"). Judge Leon concurred in the legal conclusions that formed the basis of the view expressed by Judges Henderson and Kollar-Kotelly that Section 318 failed scrutiny under *Buckley*. Supp. App. 1180sa.

Mere conjecture or speculation about circumvention of contribution limitations cannot justify the wholesale denial of constitutional rights of minors. All three judges below concluded that the Government had failed to carry its evidentiary burden on this question:

- *Judge Henderson* concluded that "[t]he government's evidence of corruption-by-conduit . . . is remarkably thin . . . ." Supp. App. 463sa.
- *Judge Kollar-Kotelly* found that "the evidence presented is insufficient to support government action that abridges constitutional freedoms," Supp. App. 1010sa, and that "[t]he Government's failure" to proffer "a more robust record establishing that such corruption exists" "dooms their argument and Section 318 of BCRA," Supp. App. 1011sa.
- *Judge Leon* concluded that, "[i]f there were in fact more substantial evidence of such circumvention . . . then restrictions, which are somewhat more onerous on children than on adults given a child's lack of independence, may be justifiable based on a compelling government interest. *That is not the case here.*" Supp. App. 1180sa (emphasis added).

Absent a quantum of evidence sufficient to support the asserted justification for Section 318, this new federal ban on political contributions only serves the speculations of Congress. *Cf. Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 508-09 (1969) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). Conjecture and speculation, however, do not equate with the kind of

substantive evidence necessary to sustain a burden on First Amendment rights. This Court has explained: "We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . ." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) (SOUTER, J., joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ.).

The district court's conclusion regarding the Government's weak evidentiary showing to establish the relevant governmental interest echoes this Court's view in *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985). There, this Court explained:

> the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption. . . . A tendency to demonstrate distrust of PACs is not sufficient. We think the District Court's finding that 'the evidence supporting an adjudicative finding of corruption or its appearance is evanescent,' was clearly within its discretion, and we will not disturb it here.

470 U.S. at 499-500 (REHNQUIST, J., joined by Burger, Ch. J., and Brennan, Blackmun, Powell, STEVENS, and O'CONNOR, JJ.) (citation omitted). The Government's "thin" evidence here was just as evanescent.

1. *Lack of Evidence Provided by the FEC to Congress.*

Senator McCain offered the only explanation for Section 318 in the floor debates of either the House or the Senate:

> we believe that wealthy individuals are easily circumventing contribution limits to both political candidates and parties by directing their children's contributions. Indeed, the FEC in 1998 notified Congress of its difficulties in enforcing the current provision. *Its legislative recommendations to Congress that year cited "substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors."*[5]

The FEC denied, however, that it had ever "stated in its legislative recommendations that it had 'substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors.'"[6]

2. *Lack of Evidence in the Hands of the FEC.*

The FEC admitted below that it lacked relevant, probative evidence of corruption or the appearance of corruption resulting from contributions by minors to candidates or to committees of political parties. The *Echols* Appellees asked the FEC to admit as true that '[n]o

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5. 148 Cong. Rec. S2145 (daily ed. March 20, 2002) (statement of Sen. McCain) (emphasis added).

6. *See* JA 1756-57 (FEC Response to Request to Admit No. 20).

present member of Congress" or "other elected federal officer" had "engaged in any corrupt act as a result of contributions by minors to candidates or contributions or donations by minors to committees of political parties."[7] In response, the FEC stated that it had "made a reasonable inquiry into this request, and the information that is readily known or available to it is insufficient to enable the Commission to admit or deny the request."[8]

Not only did the FEC lack evidence of actual corruption, its lacked evidence of an appearance of such corruption. The *Echols* Appellees asked the FEC to admit that "[n]o present member of Congress or any other elected federal officer has an appearance of corruption as a result of contributions by minors or donations by minors to committees of political parties."[9] In response, the FEC again averred that it lacked sufficient information to allow it to admit or deny that fact statement.[10]

It would have been difficult, in any event, for the FEC to provide evidence probative of parental circumvention because the FEC never required the reporting of the ages of donors. *See* 11 C.F.R. 102.9(a)(1) (requiring committees to record name and address only of donors).

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7. *See* JA 1762-63 (FEC Response to Request to Admit No. 41).

8. *See* JA 1762-63 (FEC Response to Request to Admit No. 41).

9. *See* JA 1763 (FEC Response to Request to Admit No. 42).

10. *See JA* 1763 (FEC Response to Request to Admit No. 42).

3. *Lack of Grasp of "Corrupt Acts" or "Appearance of Corruption" by the FEC.*

The FEC admitted lacking a key prerequisite to the task of identifying and collecting evidence about corruption or the appearance of corruption resulting from political contributions by minors: an understanding of what constitutes corruption or the appearance of it. As noted, the *Echols* Appellees asked the FEC about evidence of corrupt acts or the appearance of corruption. In response, the FEC objected that the terms "any corrupt act" and "has an appearance of corruption" were vague.[11]

B. THE GOVERNMENT FAILED TO ESTABLISH AN EVIDENTIARY BASIS SHOWING THAT SECTION 318 WAS CLOSELY DRAWN.

Judge Henderson noted the ample reasons to conclude that Section 318 did not reflect such an exercise in careful tailoring that the ban on political contributions by minors might be described as "closely drawn." Supp. App. 466sa; *see also* Supp. App. 1180-81sa (opinion of Judge Leon) (adopting Judge Henderson's conclusion regarding lack of narrow tailoring). Here, the Government fails to rebut those points.

1. *Section 318 Prohibits Even Symbolic Political Contributions by Minors.*

These Appellees have shown the overreaching breadth of Section 318. *See* Op. Br. at 28-30, 45-47. As this Court taught in *Buckley*, 424 U.S. at 30, and as Judge Henderson

11. *See* JA 1762-63 (FEC Response to Request to Admit Nos. 41 and 42).

noted below, "distinctions in degree become significant . . . when they can be said to amount to differences in kind." Supp. App. 464sa. *Cf. Shrink Missouri Gov. PAC*, 528 U.S. at 402 (BREYER, J., joined by GINSBURG, J.) (concurring) ("[i]n service of these objectives, the statute imposes restrictions of degree. *It does not deny the contributor the opportunity to associate with the candidate through a contribution*, though it limits a contribution's size") (emphasis added). The complete prohibition of political contributions by minors, however, reflects that kind of significant distinction in degree that amounts to a difference in kind. No mere *limitation* like the contributions ceiling affirmed in *Buckley*, Section 318 is a *ban*. FEC Br. at 134 ("BCRA § 318 bans rather than limits contributions by minors"). Nor is this ban comparable to the "limitation" sustained in *Beaumont*, for corporations remained at liberty to form PACs as a means of supporting candidates of their preference. 123 S. Ct. at 2203-04. Even nominal donations by minors, however, are banned by Section 318. Under a limitation scheme, even a severe one, the symbolic act of giving would have been preserved as a means for minors to express their association with a candidate or a committee of a political party:[12]

> A limitation . . . permits the symbolic expression of support evidenced by a contribution . . . .

Buckley, 424 U.S. at 21.

12. Four States do just that. *See* Op. Br. at 32 (citing statutes).

2. *Section 318 Prohibits Political Contributions by Minors Regardless of the Source of Funds, Potential for Corruption, or the Circumstances of the Minors.*

This Court has construed the Constitution as requiring specificity when regulating in the area of activities protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[p]recision . . . must be the touchstone"). By contrast, Section 318 bans *all* donations by *every* minor in *any* amount to *every* candidate for *any* federal office and to *every* committee of *any* political party. Section 318 reflects a careless approach to the crafting of a legislative response.

(a) Banning donations regardless of source

Section 318 is not limited to the donations of funds obtained from parents or guardians. The minors' uncontradicted evidence showed that they had funds from which they could make donations that were not attributable to parental conduit giving. *See* Op. Br. at 9 and n.13; *id.* at 10-11. No ready or apparent nexus exists between parental conduit contributions and donations minors make with money gotten by running a pet-sitting service, working as a church secretary, giving lessons in horsemanship, or by making and selling seasonal crafts. Despite the lack of a nexus, Section 318 bans *all* contributions from minors without regard to source. Such a prohibition is utterly disconnected from Congress's intention to address *parental* circumvention of donation limitations. Section 318 simply does not differentiate donations based on the source from which minors draw

their funds: employment, gift, devise, bequeath, or intentional parental circumvention.

(b) Banning de minimus donations

Section 318 bans donations that do present the risk of corruption or the appearance of corruption: donations like Jessica Mitchell's five dollar gift to a candidate,[13] or Barret O'Brock's twenty dollars to his Sunday School teacher when he ran for Congress.[14] If the ban on donations in such *de minimus* amounts is to be justified by the interest in preventing corruption or the appearance of it, the claim is impossible to justify in light of the FECA's tolerance of significantly larger donations from adults. There is simply no sensible explanation why nominal donations of five, ten or twenty dollars present too great risk of corruption when given by minors while the risk of corruption from the contributions by adults remains tolerable until donations exceed two thousand dollars in each election cycle. *See* FEC JS at 57a (BCRA § 307(a)).

(c) Banning Donations Regardless of the Circumstances of the Minors Affected

In a perfect world, children and their parents would enjoy continuous harmony and accord, including in the choice of candidates for elected office. Section 318 screens reality. Parents and children do not always agree on the merits of political candidates.[15] There is no

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13. *See* Op. Br. at 22 n.23.

14. *See* Op. Br. at 10.

15. *See* JA 833-34, Declaration of Zachary White, ¶ 19.

principled justification for banning donations made by minors in disagreement with the political opinions and choices of parents.

In a perfect world, the United States would be free from the dangers of international conflict. Section 318 utterly disrespects the self sacrifice and devotion of minors who choose to serve the common good as members of the Armed Forces while still in their minority. Title 10 U.S.C. § 505 (2002). The Government allows minors to serve as airmen, soldiers, Marines and sailors, putting at risk life and limb, but bars them from making political contributions from their meager military pay.

In a perfect world, no minor would be an orphan. But in the real world, Section 318 prohibits political contributions even by orphaned minors whose deceased parents simply cannot use their children as a conduit.

The Government's short-hand assertions regarding the legal status of minors also screens reality in important ways. The Government asserts, "[m]inors have historically been barred from voting, from entering into binding contracts, and from disposing of property." FEC Br. at 134.[16] To the contrary of the Government's view, the States take distinct and varied approaches to answering the questions related to what disabilities, if any, State law imposes on minors and when and under what circumstances. While an extended discussion is beyond

16. Curiously absent from the Government's argument, however, is any reference to supporting authority for its general propositions.

the range of pages permitted on reply, a few brief observations serve to fully undermine the Government's assertion.

First, while attaining majority at age eighteen undoubtedly bears social and personal significance to minors, the law of the Several States recognize that many minors become capable of managing their affairs before turning eighteen. The States in which the minor Appellees reside illustrate the broad variety of approaches under state law.[17] Second, despite the claim that minors traditionally have been barred from entering into contracts, laws across

17. The Government's argument regarding the status of minors at law fails to reflect the variety of approaches taken amongst the States. For example, Alabama, Florida, Georgia and Louisiana – the States of residence of the minor Appellees – have enacted varying provisions regarding the age of majority and regarding the conditions under which a minor below the age of majority may be legally emancipated from the custody, care and control of their parents. *See* Ala. Code § 26-1-1(1) (2002); Ala. Code § 26-13-1(1)-(3) (2002); Ala. Code § 26-13-8 (2002); Fla. Stat. Ann. § 743.07(1) (2001); Fla. Stat. Ann. § 743.01 (2001); Fla. Stat. Ann. § 743.015(1), (7) (2001); Ga. Code Ann. § 39-1-1(a) (2002); La. Civ. Code Ann. art. 29 (2002); La. Civ. Code Ann. art. 385 (2002); La. Civ. Code Ann. art. 3993 (2002).

Moreover, the Government's contention regarding the traditional rule that minors lack capacity to contract fails to reflect the nuances and development of the law in this area. For example, minors may contract for the provision of necessaries and cannot avoid responsibility for payment for such necessaries except in limited circumstances. *See* Ga. Code Ann. § 13-3-20(a), (b) (2002).

the Nation broadly evidence the willingness of the States to permit minors to enter into contractual arrangements in at least one discrete area: employment.[18] Yet, under Section 318, not even fully emancipated minors may make political contributions, not even from funds earned through lawful employment.

3. *Section 318 Prohibits Political Contributions by Minors Even Though the FEC Never Sought a Ban on Contributions.*

There is no pretense of tailoring about the complete ban on political contributions by minors. By contrast, in its Annual Reports, the FEC recommended that Congress take a closely drawn approach to this issue. *See* Op. Br. at 6-7. The FEC variously suggested adopting statutory presumptions regarding donations from minors under the age of sixteen and the adoption of lower minimum ages for eligibility to make political contributions. *Id.*

18. Alabama, Florida, Georgia and Louisiana all permit minors to be employed, even at ages as young as 11, although work permits are required, and minors are subject to hour, school and type-of-work restrictions that vary according to age. *See* Code of Ala. § 25-8-33 (2002), *et seq.*; Fla. Stat. § 450.012 (2001), *et seq.*; Ga. Code Ann. § 39-2-1 (2002), *et seq.*; La. R.S. 23:161 (2002), *et seq.*

4. *Section 318 Prohibits Political Contributions by Minors Even Though A Prior FEC Regulation Insured that Donations by Minors were not Conduit Contributions from Parents or Guardians.*

Prior to the enactment of Section 318, the FEC enforced a regulation that insured that contributions from minors were not, in fact, conduit contributions from parents. *See* 11 CFR 110.1(i)(2) (2002 rev. ed.).[19] That regulation focused precisely on the likely means of conduit giving by parents. It required that donations by minors be made knowingly and voluntarily, from funds under the minor's exclusive control, and not from funds given for the purpose of funding such contributions.

The FEC closely drew its regulation to meet the relevant government interests. Congress ignored that model in drawing Section 318: it bears no sign of precision on the important issues of sources of funds,

19. The regulation, former 11 CFR 110.1(i)(2) (2002 rev. ed.), permitted contributions by minors so long as:

(i) The decision to contribute is made knowingly and voluntarily by the minor child;

(ii) The funds, goods, or services contributed are owned or controlled exclusively by the minor child, such as income earned by the child, the proceeds of a trust for which the child is the beneficiary, or a savings account opened and maintained exclusively in the child's name; and

(iii) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.

independence of judgment, and absence of conduit. In response, the Government avers that while Section 318 certainly is a ban, rather than a limitation, minors remain free to participate in the political process in other ways. *See* FEC Brief at 134. This Court has rejected the very approach the Government condones. *See Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *see also* Supp. App. 466-67sa (rejecting Government's argument "[u]nder long-standing First Amendment principles") (citing cases).

CONCLUSION

The judgment of the District Court – holding Section 318 of the BCRA unconstitutional – should be affirmed.

Respectfully submitted,

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